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McNeil Engineering, Inc; McNeil Engineering and Land Surveying, LLC; and Scott McNeil, an individual v. Benchmark Engineering and Land Surveying, LLC; Benchmark Cad Services, LLC; Land Development Cadd, Inc; Dale K. Bennett, an individual; and Florence B. Alhambra, an individual : Reply Brief

Utah Court of Appeals

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Matthew C. Barneck; Paul P. Burghardt; Richards Brandt Miller Nelson; Attorneys for Appellant. Reed L. Martineau; Keith A. Call; Derek J. Williams; Snow Christiansen & Martineau; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

McNEIL ENGINEERING, INC; McNEIL
ENGINEERING AND LAND
SURVEYING, LLC; and SCOTT
McNEIL, an individual,

Plaintiffs, Counterclaim
Defendants, and Appellant,

vs.

BENCHMARK ENGINEERING AND
LAND SURVEYING, LLC;
BENCHMARK CAD SERVICES, LLC;
LAND DEVELOPMENT CADD, INC;
DALE K. BENNETT, an individual; and
FLORENCE B. ALHAMBRA, an
individual,

Defendants, Counter Claimants,
and Appellee.

REPLY BRIEF OF APPELLANT

Case No. 20100862-CA

APPEAL FROM AN ORDER AND JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY, HONORABLE L.A. DEVER

REED L. MARTINEAU, ESQ.
KEITH A. CALL, ESQ.
DEREK J. WILLIAMS, ESQ.
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145
Telephone: (801) 521-9000
Attorneys for Appellee Dale K. Bennett

MATTHEW C. BARNECK [5249]
PAUL P. BURGHARDT [10795]
RICHARDS, BRANDT, MILLER & NELSON
Wells Fargo Center, 15th Floor
299 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
*Attorneys for Appellant McNeil
Engineering & Land Surveying, LLC*

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SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145
Telephone: (801) 521-9000
Attorneys for Appellee Dale K. Bennett

MATTHEW C. BARNECK [5249]
PAUL P. BURGHARDT [10795]
RICHARDS, BRANDT, MILLER & NELSON
Wells Fargo Center, 15th Floor
299 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
*Attorneys for Appellant McNeil
Engineering & Land Surveying, LLC*

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ARGUMENT

POINT I

BENNETT WITHDREW AS A MEMBER OF ME&LS BY VOLUNTARILY TERMINATING HIS EMPLOYMENT.

A. Bennett's Employment.

Appellee Dale K. Bennett ("Bennett") fails to challenge or even comment upon the definition of the word "employment" as advanced in the Brief of Appellant. The word "employment" is not defined in Amendment No. 2 to the Operating Agreement ("Second Amendment") of McNeil Engineering and Land Surveying, LLC ("ME&LS"). The Second Amendment gives ME&LS and the other members an option to purchase the membership interest of one who withdraws, and then states as follows:

(a) For purposes of this Section, a Member shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member's employment with the Company for reasons other than bankruptcy, death, disability or incompetency.

(R. 6620 (emphasis added).) ME&LS cited Utah case law, statutes, and a dictionary source supporting a broad definition of "employment" which includes Bennett's leased employment at ME&LS. Bennett does not challenge any of these authorities or cite any contrary authority.

Specifically, the Utah Court of Appeals has held that the word "Employment" is broadly defined and liberally construed" in Utah law. *Pro-Benefit Staffing, Inc. v. Board of Review of the Industrial Commission of Utah, et al.*, 771 P.2d 1110, 1113 (Utah Ct. App. 1989) (emphasis added). A broad interpretation and liberal

construction of the word “employment” surely includes leased employment, especially under the circumstances surrounding the adoption of the Second Amendment.¹ Bennett does not contest the rule of interpretation enunciated in *Pro-Benefit*. Rather, he tries to distinguish the facts of *Pro-Benefit* and to side-step this Court’s broad rule of interpretation. (Aplee. Br. at 11-13.) ME&LS also cited two Utah statutes which illustrate that leased employees are in the “employment” of the entity where their work is done. See Utah Code Ann. § 34A-2-103(3)(a) (“the client . . . is considered the employer” of a leased employee), and Utah Code Ann. § 49-11-102(25) (the term “member” of the Utah State Retirement System “includes leased employees . . .”.) Bennett does not respond to this argument either.

ME&LS also cited a dictionary definition which states that the word “employment” means the “activity in which one engages or is employed.” *Merriam-Webster OnLine*, <http://www.Merriam-Webster.com/dictionary>. This Court has held that a dictionary definition is a “helpful guide” to the interpretation of “common, daily, non-technical speech” used in contracts and statutes. *Mesa Development Co., Inc. v. Sandy City Corp.*, 948 P.2d 366, 369 (Utah Ct. App. 1997). Bennett does not challenge or contest this dictionary definition nor does he respond to *Mesa Development*.

Moreover, Bennett fails to even mention much less contest the applicability of the *Café Rio* decision. Many Utah cases state the general principle that the Court must

¹ ME&LS leased all of its employees from MEI. Bennett was an employee of MEI who was leased to and worked only for ME&LS. (R. 6583-6585, 6628.) The Second Amendment was adopted some five years after ME&LS was formed, and each member who signed it was a leased employee of ME&LS. (R. 6618-6622.)

interpret a contract in an attempt to harmonize and give effect to all contract provisions, with a view toward giving effect to all and ignoring one. The Utah Supreme Court's recent decision in *Café Rio, Inc., et al. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, 207 P.3d 1235 applies the rule to a set of facts more directly analogous to this case than any other Utah decision.

In *Café Rio* the Court reversed a summary judgment which interpreted the word "obstruction" so as to "eviscerate" a party's right to construct a building on its parcel. The word "obstruction" was not defined in the agreement and the right to construct a building was "explicitly bargained and provided for." *Id.* ¶33. The Utah Supreme Court held: "We will not interpret a general contractual term such that it renders an explicit right meaningless." *Id.* (emphasis added). The District Court in this case made the same mistake. Judge Boyden interpreted the general contractual term "employment" in a way that rendered meaningless the right of ME&LS or its members to repurchase Bennett's membership interest when he left the Company. Bennett fails to even mention the *Café Rio* decision much less attempt to distinguish it.

It is significant to note that in *Café Rio* the Court did not base its decision on the parties' failure to define the word "obstruction" in their agreement. *Id.* ¶¶26-33. Instead the Court interpreted the "general contractual term" according to well-established rules of contract interpretation. *Id.* By contrast, the District Court in this case entered its Order in part because the parties did not change the definitions in the Operating Agreement when the Second Amendment was signed. (R. 3121.) As the *Café Rio* decision illustrates, Utah law does not require parties to define every term in a contract.

For all of those reasons this Court should broadly interpret and liberally construe the word “employment” in the Second Amendment to include leased employment, such that Bennett’s voluntary termination was a withdrawal which triggered ME&LS’ right to repurchase his membership interest.

B. Bennett Voluntarily Terminated His Employment.

The operative language of the Second Amendment says “a Member shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member’s employment with the Company” (R. 6620 (emphasis added).) Bennett argues he “resigned his employment from . . . MEI” (Aplee. Br. at 2) but he blindly refuses to admit that the resignation “terminate[d]” his leased employment with ME&LS. Bennett testified that, after ME&LS was formed at the end of 1996, he did all of his work for ME&LS. (R. 2569.) Bennett also admits he has not worked for ME&LS or any of the McNeil companies since his resignation in August 2005. (R. 6588.) Thus, it is clear that Bennett’s resignation terminated his leased employment with ME&LS, where he did all of his work from December 31, 1986 to August 17, 2005.

Moreover, it is also clear that Bennett left voluntarily. His resignation letter of August 17, 2005 (the “**Resignation Letter**”) says “I believe that it is in my best interest to leave the company and pursue other options.” (R. 6630.) Bennett does not try to suggest he left involuntarily. The Resignation Letter makes clear he left “for reasons other than bankruptcy, death, disability or incompetency.” (R. 6620, 6630.) Bennett’s insistence that he resigned only from MEI, therefore, ignores the fact that his resignation

“voluntarily . . . terminate[d]” his leased employment with and all of his work for ME&LS.

C. Bennett’s Resignation Letter.

Bennett also fails to challenge or respond to ME&LS’ argument about the effect of the Resignation Letter upon the Court’s interpretation of the Second Amendment. This Court has held that “A construction given to a contractual provision by the acts and the conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will when reasonable, be adopted and enforced by the court.” *Okelberry v. West Daniels Land Association*, 2005 UT App 327, ¶16, 120 P.3d 34 (emphasis added).

Bennett’s Resignation Letter asks for a repurchase of his membership in ME&LS. It reads: “. . . I feel it fair that I receive at least current book value for my 252 interests (at least \$695/interest) in a timely manner.” (R. 6631.) This statement undermines Bennett’s arguments before this Court. The Resignation Letter is a tacit admission that Bennett knew it would trigger the repurchase of his membership interest in ME&LS. The act of demanding repurchase of his membership interest “in a timely manner” thus reflects Bennett’s own interpretation of the Second Amendment, which should be given “great weight.” There would be no right or obligation to repurchase Bennett’s membership interest unless his resignation was a “withdrawal” as defined in Section 12.3(a) of the Second Amendment. “For purposes of this Section, a Member shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member’s employment with the Company for reasons other than bankruptcy, death,

disability or incompetency.” (R. 6620.) The Resignation Letter was made “before any controversy [had] arisen as to [the] meaning” of Section 12.3(a). *Okelberry*, 2005 UT App 327, ¶16. As such it “is entitled to great weight, and will when reasonable, be adopted and enforced by the Court.” *Id.*

Bennett does not challenge or even reference this argument in his Brief. He offers no citation to the record suggesting the Resignation Letter means something else. He also does not contest the rule of interpretation stated in *Okelberry*. Therefore, this issue is uncontested before the Court. For these reasons the Court should conclude that Bennett’s resignation was a withdrawal under Section 12.3(a) which gave ME&LS the right to repurchase his membership interest.

D. Bennett’s Other Arguments.

Bennett also makes other arguments which ignore the central issue before the Court. For example, he contends the definition of “Company” as ME&LS should end the Court’s analysis. (Aplee. Br. at 3.) The definition is not disputed, but the argument fails to acknowledge the need for the Court to determine whether Bennett’s work for ME&LS constituted “employment” and if it was voluntarily terminated by his resignation. Additionally, Bennett contends that the rights and duties of an employee of a corporation “differ markedly” from the rights and duties of a member of an LLC. (Aplee. Br. at 9.) This argument once again misses the point. The Court still must interpret the provision of the Second Amendment by which Bennett agreed that the voluntary termination of his employment triggers the Company’s right to repurchase his membership interest.

In short, the arguments in Bennett's Brief merely wander in the periphery and fail to address the core issues before the Court on this appeal.

POINT II

ALTERNATIVELY, GENUINE ISSUES OF FACT PRECLUDED ENTRY OF THE JUDGMENT.

If this Court affirms the District Court's interpretation of the word "employment," the Court nevertheless should hold that the Judgment was improperly entered because of genuine issues of fact in the record. ME&LS presented this argument in its principal brief (Aplt. Br. at 33-35) and Bennett fails to respond to it. Thus, it is uncontested before the Court that there are genuine issues of fact as to whether Bennett was entitled to a share of "guaranteed payments" from ME&LS and as to whether the Plaintiffs' damages claims more than offset Bennett's claims. Therefore, in the alternative, the Court should vacate the Judgment and Orders below because of genuine issues of material fact.

CONCLUSION

For these reasons, the Court should apply governing principles of Utah law by broadly and liberally interpreting the common, ordinary meaning of the word "employment," and by giving effect to all provisions of the Operating Agreement and the Second Amendment and ignoring none of them. The Court should conclude that Bennett's resignation terminated his leased employment with ME&LS and triggered his withdrawal as a member. Based thereon, the Court should reverse the Judgment and the

Orders of December 21, 2006 and April 2, 2008. Alternatively, the Court should reverse the Judgment because there are genuine issues of fact as to whether Bennett is entitled to a share of guaranteed payments made to ME&LS members, and as to whether any such amount would be offset by Plaintiffs' damages claims against Bennett.

DATED this 4 day of April, 2011.

RICHARDS BRANDT MILLER
& NELSON

A handwritten signature in black ink, appearing to read "Matthew C. Barneck", is written over a horizontal line.

MATTHEW C. BARNECK
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the foregoing REPLY BRIEF OF APPELLANT were sent by first-class mail, postage prepaid, on April 4, 2011, to the following:

Reed L. Martineau, Esq.
Keith A. Call, Esq.
Derek J. Williams, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145
Attorneys for Appellee


